Supreme Court, U.S.
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No. 96-861

In The

Supreme Court of the United States

October Term, 1996

MICHAEL G. BASINGER,

Petitioner,

v.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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CORPORATE AFFILIATION

Respondent, CSX Transportation, Inc., is a wholly-owned subsidiary of CSX Corporation.

Respondent, CSX Transportation, Inc., has the following nonwholly owned subsidiaries with shares outstanding in the hands of the public: Allegheny and Western Railway Company, The Baltimore and Cumberland Valley Rail Road Extension, The Central Railroad Company of South Carolina, The Cincinnati Inter-Terminal Railroad Company, The Cleveland Terminal & Valley Railroad Company, Dayton and Michigan Railroad Company, and The Home Avenue Railroad Company.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, CSX Transportation, Inc., respectfully requests that the Court deny the Petition for Writ of Certiorari ("the petition") submitted by Petitioner, Michael G. Basinger, seeking review of the decision dated July 16, 1996, of the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF JURISDICTION

Petitioner asserts that the jurisdiction of this Court to review the judgment on petition for certiorari is provided in Section 1254(c) of the Judicial Code (Title 28 U.S.C. § 1254(c)). However, no subsection (c) exists to Title 28 U.S.C. § 1254. Respondent will assume, for purposes of jurisdiction, that petitioner meant to assert that jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Sixth Circuit on petition for certiorari is proper pursuant to Section 1254(1) of the Judicial Code (Title 28 U.S.C. § 1254(1)).

RULES INVOLVED

In addition to the rules cited by Petitioner, the following rules are also relevant:

Rule 6. Time

> **(b) Enlargement.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause

shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect;. . . .

Fed. R. Civ. P. 6(b).

Rule 8:8.1 Motions – General Information

(b) Motions to be in Writing. All motions, unless made during a hearing or trial, shall be in writing and shall be made sufficiently in advance of the trial to avoid any delay in trial.

(c) Memorandum by Moving Party. The moving party shall serve and file with its motion a memorandum of the points and authorities on which it relies in support of the motion.

(d) Memorandum in Opposition. Each party opposing a motion shall serve and file a memorandum in opposition within ten (10) days after service of the motion, excluding intermediate Saturdays, Sundays, and legal holidays.

(e) Reply Memorandum. The moving party may serve and file a reply memorandum in support of its motion within five (5) days after service of the memorandum in opposition, excluding intermediate Saturdays, Sundays, and legal holidays.

. . . .

> **(g) Hearings.** The Judicial Officer may rule on unopposed motions without hearing at any time after the time for filing an opposition has expired. The Judicial Officer may also rule on any opposed motion without hearing at any time after the time for filing a reply memorandum has elapsed.
>
> . . . .

Local Rule 8:8.1 of the United States District Court for the Northern District of Ohio.

STATEMENT OF THE CASE

Respondent respectfully opposes the petition for writ of certiorari, by which petitioner aspires to "force a square peg into a round hole." The petition is an attempt to fabricate an issue concerning the interrelationship of Rules 56(c), 58 and 79(a) of the Federal Rules of Civil Procedure. However, petitioner overlooks other pertinent Federal Civil Rules, and misconstrues, or altogether fails to understand, the purposes underlying Rules 56 and 58.

I. Course of Proceedings and Disposition of the Case Below

Petitioner, on August 26, 1993, filed a Complaint in the United States District Court for the Northern District of Illinois, seeking damages under the Federal Employers' Liability Act ("FELA"), for carpal tunnel syndrome which he alleges occurred as a result of various negligent acts purportedly committed by respondent, his employer, during his employment. Both petitioner and

respondent then stipulated to transfer of the case to the United States District Court for the Northern District of Ohio, sitting at Toledo, Ohio.

Respondent served its interrogatories and requests for production of documents upon petitioner on December 8, 1993, and petitioner served his answers to these interrogatories on January 21, 1994. Petitioner's answers to respondent's interrogatories revealed that petitioner could not establish any element necessary to present a *prima facie* FELA action.

Accordingly, respondent moved for summary judgment on February 10, 1994, on the basis that petitioner's answers to respondent's interrogatories demonstrated that petitioner could not establish evidence that respondent was negligent or that any action on the part of respondent resulted in petitioner's injuries. Petitioner moved the Court for an extension of time to file a response to respondent's Motion for Summary Judgment, stating that petitioner needed additional time to provide the supporting affidavits and materials. The Court granted petitioner's motion and petitioner was given until March 15, 1994, to file his response. Petitioner responded to the motion for summary judgment on March 15, 1994.

The only evidence accompanying the response was an affidavit of the petitioner. This affidavit, even when viewed in a light most favorable to petitioner, contained no evidence of negligence on the part of respondent, or of a nexus between respondent's alleged negligence and

petitioner's carpal tunnel syndrome. Accordingly, petitioner failed to meet his evidentiary burden to demonstrate a genuine issue of material fact in order to preclude the grant of summary judgment in favor of respondent. Respondent then filed a Reply Memorandum on or about March 28, 1994, pointing to petitioner's failure in this regard.

On June 14, 1994, almost three (3) months after petitioner filed his response and respondent had filed its Reply Memorandum, the District Court granted respondent's Motion For Summary Judgment. The District Court acknowledged that the petitioner's affidavit submitted in response to respondent's Motion for Summary Judgment was deficient in several respects. First, it did not go beyond the mere allegations of the petitioner's pleading or set forth specific facts showing that there was a genuine issue for trial. (Appendix D to the Petition). Second, the District Court determined that the affidavit failed to meet the requirements of Federal Rule of Civil Procedure 56(e) in that there was no indication that the crucial assertions were based upon personal knowledge. (Appendix D to the Petition). Finally, the District Court noted that the affidavit failed to comply with the requirement that: "It set forth such facts as would be admissible in evidence." (Appendix D to the Petition). Based upon the above, the District Court ruled that petitioner's response failed to include evidence sufficient to raise a genuine issue of material fact, and summary judgment was properly granted to respondent.

Petitioner, on June 22, 1994, filed a motion for reconsideration of the summary judgment order. An affidavit of Dr. John J. Dwyer, a second affidavit of petitioner and

an excerpt from CSX's Safety Handbook were attached to that motion. On August 12, 1994, the District Court denied petitioner's motion for reconsideration, stating that the evidence petitioner sought "to submit should have been presented in his opposition to the original motion" for summary judgment. (Appendix C to the Petition).

Petitioner appealed the District Court's grant of summary judgment and denial of the motion for reconsideration to the United States Sixth Circuit Court of Appeals. The Sixth Circuit Court of Appeals affirmed both of the District Court's orders. (Appendix B to the Petition). The Court of Appeals considered petitioner's motion for reconsideration as a motion to alter or amend under Rule 59(e) of the Federal Rules of Civil Procedure, and reviewed the District Court's refusal to consider petitioner's additional evidence under an abuse of discretion standard. (Appendix B to the Petition). In addition, the Court of Appeals reviewed *de novo* the District Court's determination that petitioner's original evidence was insufficient to establish a genuine issue of material fact. (Appendix B to the Petition).

The Court of Appeals ruled on July 16, 1996, that the District Court did not abuse its discretion when it denied the motion for reconsideration which sought to submit additional evidence that had been available at the time the petitioner originally contested the summary judgment motion. (Appendix B to the Petition). Moreover, the Court of Appeals found that the District Court was correct to grant summary judgment to respondent in light of the evidence properly before it. (Appendix B to the Petition).

Petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc on or about July 29, 1996. On

August 27, 1996, the Petition was denied by the United States Court of Appeals for the Sixth Circuit. (Appendix A to the Petition).

II. Correction of Misstatements in the Petition

Pursuant to United States Supreme Court Rule 15.1, respondent brings the following misstatements of facts contained in the petition to the Court's attention.

Petitioner misrepresents to the Court the nature of the equipment and the cause of his alleged carpal tunnel syndrome. (Petition at 4). Petitioner never established that any of the equipment he utilized during the course of his employment was malfunctioning or improperly inspected, serviced, or maintained. Moreover, petitioner failed to bring forth evidence that he developed carpal tunnel syndrome as a result of his use of this equipment. It is surprising that petitioner, after having been alerted by two (2) courts that he has not established evidence of his claim, would again attempt to present as facts mere allegations unsupported by any evidence.

Moreover, petitioner represents to the Court that he is a former employee of respondent. (Petition at 3). However, petitioner remains actively employed by respondent.

REASONS FOR DENYING THE WRIT

Petitioner has identified, pursuant to Rule 10 of the Supreme Court Rules, no compelling reason to grant his petition for writ of certiorari. Contrary to the representations made in the petition, the decision of the Sixth Circuit Court of Appeals is not in direct conflict with the

decision of this Court in *United States v. Indrelunas*, 411 U.S. 216 (1973). Petitioner's interpretation of the interrelationship between Rules 56(c), 58 and 79(a) completely ignores the purposes underlying these rules. In fact, the Sixth Circuit Court of Appeals' decision is consistent with the purposes underlying Rules 56 and 58 of the Federal Rules of Civil Procedure as expressed by this Court. Accordingly, there is no important issue concerning the interrelationship of Rules 56(c), 58, and 79(a) awaiting determination, and the petition for writ of certiorari should be denied. The District Court and the Sixth Circuit Court of Appeals correctly applied existing, well-established precedent to the facts of this case. Petitioner's assertion that there is an issue to be heard is a last, desperate attempt to seek review of a proper and well-reasoned decision of the District Court, albeit one unfavorable to petitioner.

I. The Sixth Circuit Court of Appeals' Decision and Opinion is Not in Conflict with this Court's Opinion in *United States v. Indrelunas*, 411 U.S. 216 (1973) and Other Federal Court Opinions.

Petitioner argues that he is entitled to *de novo* review of all evidence on file in the district court prior to entry of judgment. (Petition at 7). He argues that Rule 58 requires such *de novo* review. Petitioner argues further that the failure of the Sixth Circuit Court of Appeals to address Petitioner's Rule 58 contention is in conflict with the decision of this Court in *United States v. Indrelunas*, 411 U.S. 216 (1973). (Petition at 7). Petitioner's interpretation of Rule 58 and arguments are patently wrong because the issue facing the Court in *Indrelunas* was entirely different from the "issue" petitioner now attempts to create in the

instant case. Petitioner ignores the purpose underlying Rule 58 of the Federal Rules of Civil Procedure and fails to recognize that there simply is no issue remaining in this case.

The question facing the Court in *United States v. Indrelunas*, 411 U.S. 216 (1973), was whether the United States Court of Appeals for the Seventh Circuit had erred in dismissing an appeal on the basis that the appeal was untimely filed under the provisions of Rule 4 of the Federal Rules of Appellate Procedure. The *Indrelunas* case had nothing to do with Rule 56 of the Federal Rules of Civil Procedure, motions for summary judgment, the filing of untimely affidavits, or motions for reconsideration. In fact, the *Indrelunas* case involved an appeal after a jury verdict had been entered in favor of certain taxpayers. *See id.* at p. 218. Accordingly, petitioner's reliance on this opinion is misplaced.

Indeed, the only relevance the *Indrelunas* opinion has to this case is its discussion of the purpose underlying Rule 58. The *Indrelunas* opinion makes it clear that the sole purpose of the separate-document requirement added to Rule 58 was to clarify when the time for appeal begins to run. *Id.* at 220-221. No possible reading of the *Indrelunas* opinion mandates that a Court of Appeals panel is required to consider affidavits *de novo* which were untimely filed by petitioner after summary judgment was already granted against him.

The other caselaw cited by petitioner also does not support his position. For example, petitioner cites *Atlantic Richfield Co. v. Monarch Leasing Co.*, 84 F.3d 204 (6th Cir. 1996), as a case that supports his argument that the Court

of Appeals was required by Rule 58 to review *de novo* the untimely affidavits he filed after the District Court had considered the evidence properly before it and granted summary judgment to respondent. No reading of the *Atlantic Richfield* opinion could lead to the conclusion that Rule 58 required the Court of Appeals to consider petitioner's untimely affidavits. In *Atlantic Richfield*, the Court of Appeals for the Sixth Circuit was faced with the issue of whether the plaintiff had timely filed its complaint to extend the life of the original judgment it had won. *See id.* at 207.

The opinion of the Sixth Circuit Court of Appeals in *United States v. Woods*, 885 F.2d 352 (6th Cir. 1989), also does not support petitioner's position. One of the questions before the Court in the *Woods* case was whether a district court's failure to follow the dictates of Rule 58 of the Federal Rules of Civil Procedure required a reversal of the grant of summary judgment to the plaintiff. In *Woods*, the district court had failed to set forth the judgment in a separate document, and had instead entered a marginal order upon the plaintiff's motion for summary judgment. *Id.* at 353. The Court held that the grant of summary judgment in favor of the plaintiff had to be reversed in light of the fact that no reason at all had been set out for the grant of summary judgment in favor of the plaintiff and Rule 58 clearly had been violated because no separate judgment had been entered. *Id.* at 354. No such violation of Rule 58 occurred in the present case.

Respondent does not dispute that Rule 58 of the Federal Rules of Civil Procedure requires that every judgment be set forth on a separate document. Respondent does, however, dispute that this civil rule gives rise to an

issue for appeal in the instant case. No case cited by petitioner in the petition requires *de novo* review by a Court of Appeals of untimely affidavits opposing a motion for summary judgment filed after the Court has already considered the evidence properly before it and granted summary judgment to respondent.

II. The Sixth Circuit Court of Appeals' Decision, Affirming the District Court's Ruling, Follows Well-Settled Principles and Furthers the Purpose Underlying Rule 56.

Both the opinion of the Sixth Circuit Court of Appeals and the opinion of the District Court are consistent with established caselaw. This Court, in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), determined that a Court of Appeals could not rely upon supplemental affidavits which were submitted by a party after that party had already filed its opposition to a Motion for Summary Judgment. This Court held that the district court did not abuse its discretion in declining to admit the affidavits:

> Respondent's evidentiary submission was indeed untimely, both under Rule 56, which requires affidavits in opposition to a summary judgment motion to be served "prior to the day of the hearing," Fed. R. Civ. Proc. 56(c), and under Rule 6(d), which states more generally that "[w]hen a motion is supported by affidavit, . . . opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time." Rule 6(b) sets out the proper approach in the case of late filings:

> "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect. . . . "

Id. at 895.

Local Rule 8:8.1(g) of the United States District Court for the Northern District of Ohio, containing information relating to motions, provides the following:

> (g) *Hearings.* The Judicial Officer may rule on unopposed motions without hearing at any time after the time for filing an opposition has expired. The Judicial Officer may also rule on any opposed motion without hearing at any time after the time for filing a reply memorandum has elapsed.

Petitioner was put on notice by this local rule that at any time after respondent filed its Reply Memorandum, respondent's Motion for Summary Judgment could be ruled upon by the Court. Accordingly, the time for filing affidavits opposing the motion for summary judgment was prior to the time for filing a reply memorandum had lapsed, not after summary judgment had been granted in favor of respondent.

The law in the Sixth Circuit is consistent with this Court's determination that, in the context of a summary

judgment motion, the district court has the discretion to refuse the filing of untimely affidavits. *See, e.g., Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 43 F.3d 1054, 1065 (6th Cir. 1995), *cert. denied*, 116 S.Ct. 296 (1995); *Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1446 (6th Cir. 1993). This Court had made it clear that, "[T]he purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990). When respondent filed its original motion for summary judgment, petitioner was required to oppose that motion with a sworn averment. Petitioner failed to provide such sworn testimony in a timely fashion, and cannot now be permitted to misconstrue the Federal Rules of Civil Procedure in order to circumvent his own dilatory tactics.

CONCLUSION

There being no conflict between opinions of this Court, the Federal Rules of Civil Procedure, and the Sixth Circuit Court of Appeals' opinion in this case, the writ of certiorari should be denied.

Respectfully submitted,

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Dated: December 24, 1996